Supreme Court, U.S.
FILED

07-317 SEP 2007

No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SENIOR AIRMAN STEVEN M. CHAPMAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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September 2007

QUESTION PRESENTED

A general court-martial tried and convicted the petitioner, an active duty member of the United States Air Force, of attempted premeditated murder, rape, and forcible sodomy of LJ and burglary of LJ's dwelling with the intent to commit rape. The Air Force Court of Criminal Appeals affirmed his conviction. The Court of Appeals for the Armed Forces summarily granted and affirmed the Court of Criminal Appeals' ruling. The question presented in this case is:

Whether the convening authority and military judge denied the petitioner's due process right to present his defense by denying petitioner's requests for an expert on false confessions, where the government presented little evidence connecting the petitioner to the charged offenses besides his purported confession, and the defense's theory of the case was that the confession was false?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE WRIT 4
CONCLUSION 7

APPENDIX A
Opinion of the United States Air Force Court of Criminal Appeals (14 July 2006) 1a

APPENDIX B
Opinion of the United States Court of Appeals for the Armed Forces (26 June 2007) 17a

TABLE OF AUTHORITIES

Page

Constitutional Provisions

5th Amendment.....1
14th Amendment.....1,4

Decisions of the Supreme Court of the United States

Ake v. Oklahoma, 470 U.S. 68 (1985) 4-7

Military Court Decisions

United States v. Chapman,
ACM 35564 (A.F. Ct. Crim. App. 2006)
(unpub. op.) 1-4
United States v. Chapman,
__ M.J. __ No. 06-0907/AF
(C.A.A.F. Daily Journal 26 June 2007).....1,4
United States v. Ndanyi,
35 M.J. 415 (C.A.A.F. 1996).....5
United States v. Van Horn,
26 M.J. 434 (C.M.A. 1988) 5

Federal Statutes

10 U.S.C. § 867a 1
28 U.S.C. § 1259 1

The petitioner, Senior Airman Steven M. Chapman, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on June 26, 2007.

OPINIONS BELOW

The Air Force Court of Criminal Appeals issued an unpublished opinion on 14 July 2006 (Appendix A).

JURISDICTION

On June 26, 2007, the Court of Appeals for the Armed Forces granted the petitioner's petition for grant of review of the Court of Criminal Appeals' decision and affirmed the lower court. (Appendix B) The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867a(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall ...be deprived of life, liberty or property, without due process of law...." The Fourteenth Amendment to the United States Constitution provides that "nor shall any State deprive any person of life, liberty or property, without due process of law...."

STATEMENT OF THE CASE

A general court-martial tried and convicted the petitioner, an active duty member of the United

States Air Force, of attempted premeditated murder, rape, and forcible sodomy of LJ and burglary of LJ's dwelling with the intent to commit rape. Besides his purported confession, the government presented little evidence to connect the petitioner to the charged offenses. Both the convening authority and the military judge had denied the petitioner's request to appoint a defense expert on false confessions.

The Air Force Court of Criminal Appeals affirmed the petitioner's conviction. The Court of Appeals for the Armed Forces summarily granted and affirmed the Court of Criminal Appeals' ruling. Because the convening authority and military judge's failure to appoint an expert on false confessions denied the petitioner his due process right to present his defense, his case merits review.

1. Factual Background

On 10 February 2001, LJ was assaulted in her home near Cannon Air Force Base, New Mexico. *See United States v. Chapman*, ACM 35564, unpub. op. at 2-4 (A.F. Ct. Crim. App. 14 Jul 2006). She identified Airman First Class (A1C) CH as her attacker. *See id.* at 4. She told her husband and law enforcement officials that A1C CH had raped her, struck her on the head, and cut her throat in a 30-minute period between 4:00 and 5:00 that morning. *See id.* at 2-4.

As the trial counsel prepared the case against A1C CH, he became concerned that the scientific evidence failed to support LJ's assertion that A1C CH had raped her. *See id.* at 4. He made arrangements to re-interview many of the potential witnesses. *See id.* The trial counsel met with the petitioner, LJ's duplex neighbor. *See id.*

During the interview, the petitioner made several statements that caused the trial counsel to ask the Air Force Office of Special Investigations (AFOSI) to interview the petitioner under rights advisement. *See id.* On 7 November 2001, the petitioner waived his rights and confessed to raping and sodomizing LJ, and cutting her throat with a knife. *See id.* He also provided a written statement detailing his actions. *See id.*

Prior to the trial, the defense requested that the convening authority appoint a false confession expert to assist in trial preparation. The convening authority denied the request. The defense filed a motion to compel production of the expert, but the military judge denied the request. *See* R. 681-84; App. Ex. LXXII-LXXIV. The defense renewed its request during the trial, but the military judge again denied it. *See* R. 1433-38, 1451-52.

2. Proceedings Below

On 13 July 2002, the panel of officer and enlisted members found the petitioner guilty of attempted murder, rape and forcible sodomy of LJ

and burglary of LJ's dwelling with the intent to commit rape. *See* R. 1828. Two days later, the panel sentenced him to a dishonorable discharge, confinement for life with the possibility of parole, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. *See* R. 1965. The convening authority approved the adjudged findings and sentence. *See* General Court-Martial Order No. 30, dated 30 April 2003, Record of Trial, Vol. 1.

The petitioner appealed to the Air Force Court of Criminal Appeals, which affirmed the approved findings and sentence in an unpublished opinion on July 14, 2006. Appendix A. On June 26, 2007, the Court of Appeals for the Armed Forces granted the petitioner's petition for grant of review of the Court of Criminal Appeals' decision and affirmed the lower court in a summary opinion. Appendix B.

REASONS FOR GRANTING THE WRIT

In *Ake v. Oklahoma*, 470 U.S. 68,75 (1985), this Court ruled that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." The Court based its opinion in "the *Fourteenth Amendment's* due process guarantee of fundamental fairness." Parallel concerns in the petitioner's case dictate that

the convening authority and military judge likewise violated his due process right to present his defense by denying his request for an expert in false confessions.

It is true that the trial court did not enter a finding on whether the petitioner was, in fact, unable to afford an expert in false confessions. Nevertheless, the highest military appellate court has recognized the parallel between this Court's standards for indigent defendants and the military's standards for all service members when analyzing whether a military accused is entitled to expert assistance at government expense. *See, e.g., United States v. Ndanyi,* 45 M.J. 315 (C.A.A.F. 1996); *United States v. Van Horn*, 26 M.J. 434, 437 (C.M.A. 1988). In this light, the petitioner asks this Court to extend the protections offered to indigent defendants to the men and women of our armed services.

When these standards are applied, it follows that the petitioner was tried without "the raw materials integral to the building of an effective defense." *Ake*, 470 U.S. at 77. The petitioner's purported confession was the linchpin of the government's case; little evidence corroborated it. Certainly – and as signaled by the defense in their motion to compel – the question of the truthfulness of the petitioner's statements to AFOSI were likely to be a "significant factor in his defense." *Id.* at 86.

This Court's opinion in *Ake* provided a three-factor analysis for determining whether the government must provide an expert to an indigent defendant: the private interest affected by the government's action, the governmental interest affected if the safeguard is provided and the value of the safeguards and risk of an erroneous deprivation of the affected interest. *See id.* at 77. The petitioner's "private interest in the accuracy of a criminal proceeding that places [his] life or liberty at risk" is just as "uniquely compelling" as it was for the defendant in *Ake*. *Id.* at 78. Because the government's obligation would have been limited to providing one expert in false confessions and it would have had the same interest in "the fair and accurate adjudication of its criminal cases" as in *Ake*, the government's interest would have been equally "not substantial." *Id.*

The third factor – the probable value of the assistance sought and the risk of error if it were not offered to the petitioner – also points in the petitioner's favor. The defense requested an expert to advance a counterintuitive theory: that the petitioner would have confessed to something that he did not do. Because of its counterintuitiveness, the theory would have had little chance of success before the trier of fact – a panel of officer and enlisted members – without the authoritative support that an expert would have provided. Consequently, the requested expert assistance had

great value, and its denial carried high risk of error. It follows that the same principles that caused this Court to find a denial of due process in *Ake* are present in the petitioner's case. His trial similarly represents a denial of his due process right to present his defense.

CONCLUSION

The petitioner therefore respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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September 2007

Appendix A

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman STEVEN M. CHAPMAN
United States Air Force

ACM 35564

14 July 2006

Sentence adjudged 15 July 2002 by GCM convened at Cannon Air Force Base, Texas. Military Judge: Patrick M. Rosenow.

Approved sentence: Dishonorable discharge, confinement for life with the possibility of parole, forfeiture of all pay and allowances, and reduction to E-1

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade,

Major Terry L. McElyea, Major Sandra K. Whittington, Major David P. Bennett, and Major Karen L. Hecker.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major James K. Floyd, Major John C. Johnson, and Major Stacey J. Vetter.

Before

ORR, JOHNSON and JACOBSON

Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial, of attempted premeditated murder, rape, sodomy, and burglary, in violation of Articles 80, 120, 125, and 129, UCMJ, 10 U.S.C. §§ 880, 920, 925, 929. A panel of officer members sentenced the appellant to a dishonorable discharge, confinement for life with the possibility of parole, forfeiture of all pay and allowances, and reduction to E-1. The convening

authority approved the findings and sentence as adjudged.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. On appeal, the appellant challenges the legal and factual sufficiency of his conviction to all of the charges and specifications. He also asserts that the military judge erred by admitting the graphic photograph of the injuries to the victim's neck. Additionally, the appellant personally asserted 13 errors for our consideration:[1] (1) Whether the military judge erred by denying a defense motion to suppress his November 2001 statement; (2) Whether the military judge erred by denying a defense motion to suppress his October and November 2001 statements; (3) Whether the military judge erred by admitting testimony from the appellant's ex-wife regarding a prior assault; (4) Whether the military judge erred by admitting testimony from the appellant's ex-wife regarding their sexual relationship; (5) Whether the military judge erred by admitting testimony from two witnesses who testified about his explanation as to why someone may have assaulted the victim;

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[1] All of the following 13 issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

(6) Whether the military judge erred by denying a defense motion for a change of venue; (7) Whether the military judge erred by admitting the testimony of a witness after the government failed to provide the defense with notice in a timely manner; (8) Whether the appellant's right to a speedy trial was violated; (9) Whether the appellant is entitled to sentence credit due to unwarranted post-trial delay; (10) Whether the appellant was subject to unlawful pretrial punishment when the conditions of his pretrial confinement violated Article 13, UCMJ, 10 U.S.C. § 813, and also constituted cruel and unusual punishment; (11) Whether the military judge abused his discretion by permitting an expert witness to testify that the appellant had low rehabilitative potential; (12) Whether the military judge erred by denying the defense request for an expert on false confessions; and (13) Whether the appellant's right to fair appeal of his conviction is violated when the appellate government counsel on the case are operating under a conflict of interest. We find all 15 assignments of error to be without merit and affirm.

Background

At the time of his court-martial, the appellant was assigned to the 27th Civil Engineering Squadron at Cannon Air Force Base (AFB), New Mexico. Prior to that, he was involuntarily removed from the Security Forces career field after he held a gun to his head in a gesture later determined to be a suicidal ideation. The appellant and his former wife lived in a duplex-style house on Cannon AFB with Senior Airman (SrA) J and his wife Mrs. LJ living in the adjoining home.

On 9 February 2001 (Airman First Class) A1C H called the J's and asked to speak to SrA J. When Mrs. LJ told A1C H that her husband would not be home until after midnight, SrA H asked whether he could stop by and pick up a W-2 form that SrA J was holding for him. Mrs. LJ told A1C H that her husband would probably want to see him and that he should pick up the W-2 the following day when her husband would be home. Even though A1C H's wife, Mrs. SH, and Mrs. LJ were best friends, A1C H did not get along with Mrs. LJ and had called her a "bitch" on a previous occasion. He later gave Mrs. LJ a note apologizing for his inappropriate comments

about her. Mrs. LJ read the note and placed it on a dresser in her bedroom.

The appellant also called the J's that same afternoon and asked to speak to SrA J. Mrs. LJ told the appellant that he was working late, but that she would tell her husband that he was invited to join the appellant at the club when he got off work. Mrs. LJ then left the house because she had volunteered to go to the H's home to help Mrs. SH pack up her personal belongings. Mrs. SH was in the process of moving out of her house because her and her husband were getting a divorce. After packing some of Mrs. SH's belongings, the two of them took a break to meet Mrs. SH's boyfriend. He asked them to go the Shoppette and buy him cigarettes. They agreed and dropped the cigarettes off at his dormitory room before returning to the H's house to continue packing.

Sometime later, Mrs. LJ called her boyfriend, SrA K, and the two women went back to the Shoppette and bought some alcohol. The two of them stopped to pick up SrA K and returned to the H's house to play a drinking game. Mrs. LJ had a few drinks and returned home around 0130 hours. When Mrs. LJ got home her husband was not there. SrA J had come home from work and went out to the enlisted club with several of his friends. Mrs. LJ

then talked to SrA K because she was concerned that one of her husband's friends had spotted the three of them together. After talking to SrA K for about ten minutes, she turned out the light on the headboard of the bed and went to sleep.

A few hours later, Mrs. LJ awoke after hearing rustling noises. Mrs. J has 20/400 vision and can only see clearly for about seven inches; she had taken her contact lenses out earlier in the night. She turned on the light on the headboard and saw a naked man standing next to her bed. She thought the man was A1C H and asked him what he was doing in her bedroom. The assailant did not answer and reached over and turned out the light. He then put a pillow over Mrs. LJ's face and put his arms around her neck and then pulled her off of the bed and started taking off her clothes. After the assailant took off her clothes, he put her back onto the bed and forced her legs apart. He then began to have sexual intercourse with her. The assailant rolled Mrs. LJ over onto her stomach and began to have anal intercourse with her. He stopped when Mrs. LJ screamed; he then turned her back over onto her back and began having sexual intercourse with her. The assailant then performed oral sex on Mrs. LJ. Throughout this ordeal, the assailant asked Mrs. LJ whether she liked it and then told her that he

had wanted to have sex with her for a long time. Not satisfied with her response, the assailant told her to "shut up" because she was crying.

Soon after forcing himself on Mrs. LJ, the assailant put a comforter over her head and walked her around the house. He then started spinning her around and asked her whether she wanted some water. As they walked into the kitchen, the assailant grabbed a frying pan and hit Mrs. LJ on her head several times causing her to fall to the floor. Mrs. LJ heard the assailant rummaging through the kitchen drawers and when the noise stopped, he lifted the comforter off of her head. The assailant then used a knife he found inside a kitchen drawer and cut her throat almost from ear to ear.

Investigators later learned from his confession that the appellant went outside the house and got a large garbage can to put her body into. As he returned to the kitchen, he heard SrA J's car coming into the driveway. The appellant ran out the back door and jumped over the back fence and went inside his house. He grabbed his keys and drove off in his jeep.

SrA J discovered his wife on the kitchen floor and called 911 for help. While he was on the phone, Mrs. LJ told her husband that A1C H had done this to her. Mrs. LJ told the responding security forces personnel and medical team that

treated her at the hospital that A1C H raped her. Based on Mrs. LJ's statement, and A1C H's note found in the J's bedroom, the local police and security forces members went looking for A1C H. He was apprehended on 10 February 2001 at the gate as he was driving onto the base. Despite his proclaimed innocence, his commander ordered him into pretrial confinement. A1C H remained in confinement until the charges against him were dismissed on 13 August 2001.

As the trial counsel was preparing the case against A1C H, he was concerned that the scientific evidence was not consistent with Mrs. LJ's assertion that A1C H raped her. As a result, he made arrangements to re-interview many of the potential witnesses. The trial counsel met with the appellant because the appellant was the J's duplex neighbor. During the interview the appellant made several statements that caused the trial counsel some concern, so much so that the trial counsel asked agents from the Air Force Office of Special Investigations (AFOSI) to interview the appellant under rights advisement. On 7 November 2001, the appellant waived his rights and confessed to raping, sodomizing Mrs. LJ, and cutting her throat with a knife. He also provided a written statement detailing his actions on 9 February 2001.

Legal and Factual Sufficiency

The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

In his first assignment of error, the appellant argues that the evidence presented at trial was legally and factually insufficient to sustain the findings of guilty to the offenses because his trial defense counsel presented significant evidence that someone else assaulted Mrs. LJ. He argues that is was just as likely that A1C H, Mrs. LJ's husband, or a third individual committed these offenses. Each of them had either the motive and or the opportunity to assault Mrs. LJ. Specifically, Mrs. LJ identified A1C H as the person who assaulted her. In fact, she said that on a scale of one to ten, with ten

being sure beyond a reasonable doubt, she believed A1C H was her assailant with a "ten" degree of certainty.

Next, SrA J and the victim were having marital difficulties. SrA J knew his wife was having an affair because he went to his commander who issued a "no contact" order to his wife's boyfriend, SrA K. Hours before the assault, SrA J told a female Airman at the enlisted club that she should talk to him and not be concerned about the fact that he was married "after tonight."

Additionally, the appellant contends that a third person may have committed the assault because there was an unidentified fingerprint on the frying pan found in the kitchen and unidentified prints on an orange soda can found in the living room. Moreover, during the assault, Mrs. LJ asked the assailant whether her husband was there and the attacker responded "[w]e're not that sick." Next, the appellant asks this Court to disregard his confession because of the circumstances of how the statement was made. Because he was a security forces member who held law enforcement officials in high esteem, and was not in a strong mental state when questioned, he was unable to resist the tactics the AFOSI agents used to obtain his confession.

Although there is some evidence indicating that someone other than the appellant may have committed the assault on Mrs. LJ, the panel members found otherwise. *See United States v. McCarthy*, 24 M.J. 841, 842-32 (A.F.C.M.R. 1987), *aff'd*, 27 M.J. 320 (C.M.A. 1988); *United States v. Steward*, 18 M.J. 506, 508 (A.F.C.M.R. 1984). The most convincing evidence against the appellant was his 7 November 2001 statement. In his statement, he admits details of the assault that only the assailant and the victim would know, e.g., the details of their conversation, the clothes Mrs. LJ was wearing, the fact the assailant was naked when he entered the bedroom, the sequence of the assault, and the fact that SrA J was not home when he entered the house. The appellant also knew the marital problems the J's were having and that the J's routinely left the inside garage door unlocked. Additionally, his fingerprint was found on the handle of a dented frying pan found in the kitchen near the victim.

We also find the appellant's argument that we should disregard his confession because he was a former security forces member, with a history of depression, unpersuasive. The appellant made statements and took actions that corroborated his confession to the AFOSI agents. *See United States v. Bubonics*, 45 M.J.

93, 95 (C.A.A.F. 1996); Mil. R. Evid. 304(e)(1). First, he returned his jeep to the auto dealership after the assault and gave a questionable reason for doing so. He also made statements to his ex-wife's co-worker, Ms. BC, such as "she [Mrs. LJ] had messed around on her husband before," and suggested she was a "slut," giving Ms. BC the impression that he believed the victim deserved to be assaulted. Moreover, the other possible suspects could reasonably account for their whereabouts during the time of the assault.

After considering all of the evidence, we are convinced beyond a reasonable doubt that the appellant committed these offenses. Therefore, his conviction is legally and factually sufficient. *See Turner*, 25 M.J. at 324-25.

Admission of the Photograph

In his second assignment of error, the appellant argues that the military judge erred by admitting a photograph of the injuries to Mrs. LJ's neck because it was too graphic. He contends that the picture was taken while medical personnel stretched her neck skin apart, thus making the injuries more graphic than they actually appeared. As a result, he avers that the photograph was unduly prejudicial and asks this Court to set aside the findings and sentence.

We review the issue of admissibility of evidence under an abuse of discretion standard. *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). A military judge's conclusions of law are reviewed de novo. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). If the military judge's ruling is based on an erroneous view of the law, the judge has abused his discretion. *United States v. Nash*, 44 M.J. 456, 457 (C.A.A.F. 1996).

In the instant case, the appellant objected when the government submitted the photograph into evidence. After hearing argument from both sides the military judge performed a balancing test under Mil. R. Evid. 403 and determined that the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice. We agree.

According to Dr. Nicholas Rowley, one of the surgeons who operated on Mrs. LJ's neck, the cut was from left to right, 270 degrees in length, and approximately one and one half inches deep. He opined the victim was most likely cut from behind. He said it was necessary to stretch her neck to reach her epiglottis (cartilage at the root of the tongue) so he could put it back were it belonged. Additionally, he testified that a fair amount of force or a very sharp instrument was used because most of Mrs.

LJ's neck muscles and external jugulars were cut. Based on Dr. Rowley's testimony, we conclude that the photograph was used to depict the extent and nature of Mrs. LJ's injuries and the stretching was a necessary part of the treatment. Because the appellant was charged with attempted murder and the government was required to show grievous bodily harm to obtain a conviction, the military judge did not abuse his discretion by admitting the photograph into evidence. *See Houser*, 36 M.J. at 397; *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 43b(d) (2005 ed.).[2]

Remaining Issues

Finally, we considered the appellant's remaining assignments of error and find them to be without merit. *See* Article 31, UCMJ, 10 U.S.C. § 831; Mil. R. Evid. 304(c)(1), 305, 403, and 513; *United States v. Huffman*, 40 M.J. 225, 227 (C.M.A. 1994); *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

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[2] This paragraph is identical in the 2002 edition of the *Manual* that was in effect at the time of the appellant's court-martial.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

Appendix B

UNITED STATES, Appellee

v.

STEVEN M. CHAPMAN,
Staff Sergeant U.S. Air Force,
Appellant

No. 06-0907

Crim. App. No. 35564

__ M.J. __

United States Court of Appeals for the Armed Forces

Decided June 26, 2007

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, said petition

is granted and the decision of the United States Air Force Court of Criminal Appeals is affirmed.